No. 80-788

MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation

M.D.L. 310

ADAMS EXTRACT COMPANY, ET AL.,

Petitioners,

v.

CHARLES J. FRANEY AND ALEX HOPKINS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT ALEX HOPKINS

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QUESTION PRESENTED

Does a court have the power to determine prospectively that deposition testimony will be tainted by previously immunized testimony in a legal proceeding in which the Government is not a party?

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STATEMENT OF THE CASE

On September 14, 1976, a federal grand jury in the Southern District of Texas investigating the pricing practices of the corrugated container industry issued a subpoena to Mr. Alex Hopkins. At that time Mr. Hopkins was the Sales Manager for MacMillan Bloedel Containers in Little Rock, Arkansas. On October 6, 1976, Mr. Hopkins testified before the grand jury pursuant to an order of immunity which had been entered upon application of the United States Attorney under 18 U.S.C. §§6001-6003. A transcript of Mr. Hopkins' testimony was made

available to the plaintiffs in this case by court order dated January 25, 1980.

As a result of the investigation, the grand jury returned indictments in *United States* v. *International Paper Company, et al.*, No. 78-H-11 and *United States* v. *Boise Cascade Corporation, et al.*, No. 78-H-12 (S.D. Tex. 1979). The indictments alleged price fixing in the corrugated container industry over many years. The federal prosecutor sought and obtained a second order of immunity for the testimony of Mr. Hopkins at the criminal trial. Mr. Hopkins testified at that trial on March 12, 1979.

After the criminal trial, the plaintiffs in this private antitrust action sought to take the deposition of Mr. Hopkins. Mr. Hopkins appeared for the deposition on January 30, 1980. Mr. Hopkins gave his name, address, occupation and employment background, but as to all other questions claimed his constitutional privilege against self-incrimination.

On March 5, 1980, Charles J. Franey, another witness similarly situated, appeared in open Court before United States District Judge John V. Singleton, Jr. and refused to answer deposition questions. In Pretrial Order No. 40 ("PTO 40") entered on March 6, Judge Singleton ruled that the deposition questions "may be answered without subjecting Mr. Franey to any possibility of future prosecution." The Court reached this conclusion "because all the (deposition) questions are either taken verbatim from the transcript of his immunized testimony or are so closely related in subject matter and so clearly derived from the immunized testimony as to be thoroughly tainted and inadmissible against him in any conceivable future prosecution." Accordingly, the Court held Mr. Franey in civil contempt for the continued invocation of his Fifth Amendment privilege.

On March 19, 1980, the deposition of Mr. Hopkins resumed. As he had done on January 30, Mr. Hopkins declined to answer questions by claiming his constitutional privilege. The deposition was recessed and continued in open Court before Judge

Singleton. Counsel for the plaintiffs asked Mr. Hopkins verbatim questions from Mr. Hopkins' grand jury testimony and some questions described by counsel for the plaintiffs as "questions we believe are derived from the substance of the previous questions." Counsel for the plaintiffs then asked Mr. Hopkins some verbatim questions from his March 12, 1979, trial testimony and what counsel described as "questions that are derived from the substance of those questions." Upon advice of counsel, Mr. Hopkins refused to answer all of these questions and invoked his Fifth Amendment privilege against self-incrimination. Mr. Hopkins related a fear of prosecution because a federal grand jury in Ohio was presently investigating the corrugated industry and because Mr. Hopkins was closely acquainted with many people who would be prospective witnesses during that investigation.

The District Court held Mr. Hopkins in civil contempt for his refusal to answer. The Court's decision was reduced to writing in Pretrial Order No. 44 ("PTO 44") dated March 20, 1980. The order states:

> "Alex Hopkins, a witness who gave immunized testimony in the grand jury investigation of the corrugated container industry in Houston and also in the trial of H-78-11 and H-78-12 in this court, and who has refused to answer on deposition in this civil cause verbatim questions from and questions derived from the same substantive matters as covered in his immunized testimony, in spite of this court's ruling that such answers would be so clearly and thoroughly derived from the immunized testimony that they could never be used to prosecute Mr. Hopkins and therefore that he has no legitimate fear of self-incrimination, it is hereby ORDERED, ADJUDGED, AND DECREED that said Alex Hopkins shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, §1826, United States Code and the Federal Rules of Civil Procedure, ..."

Mr. Hopkins was sentenced to a term of confinement and the payment of a fine. The sentence was stayed in all respects during the pendency of a timely and expeditious appeal. Presumably the legal reasoning the District Court employed to reach its decision in PTO 40 applied to the action against Mr. Hopkins in PTO 44.

On June 19, 1980, the Fifth Circuit by a 2-1 vote vacated the order of the District Court compelling Mr. Hopkins to answer deposition questions and adjudging him in contempt for his refusal. *In re Corrugated Container Antitrust Litigation*, 620 F.2d 1086, 1095 (5th Cir. 1980). The Court of Appeals reasoned that "the district court's orders are supported by neither the immunity statute nor any authority inherent in the court . . . ." Id.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly determined that two prior grants of immunity in criminal proceedings do not supplant the protection afforded a witness by the Fifth Amendment. The immunity statute protects only the source of testimony. The rendition of the testimony at a civil deposition creates a new source. Another grand jury is investigating potential antitrust violations in the corrugated container industry. If Mr. Hopkins should be accused of a crime, there is no guarantee that another court will find deposition testimony by Mr. Hopkins to be tainted by the testimony given by him with immunity. Thus, the Fifth Circuit properly ruled that the issue of taint cannot be determined prospectively. In addition, since the Government would not be a party to any deposition in this proceeding, this case does not conflict with cases cited by Petitioners in which courts ruled that governmental action in eliciting the testimony provided the witness with immunity.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT PRIOR IMMUNITY DOES NOT PROTECT THE WITNESS WHEN HE IS LATER ASKED INCRIMINATING QUESTIONS IN A CIVIL DEPOSITION.

The Fifth Circuit found that the questions plaintiffs seek to ask Mr. Hopkins concern his "knowledge of and participation in the alleged nationwide price-fixing conspiracy. (His) answers to the deposition questions may well reveal that (he has) violated federal and state antitrust laws." 620 F.2d at 1092. Petitioners in no way challenge this finding. The Fifth Circuit also ruled that the risk of future prosecution must be gauged by the standard set forth by the Seventh Circuit in the case of *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979):

> "When a witness can demonstrate any possibility of prosecution which is more than fanciful, he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster."

The Fifth Circuit found that Mr. Hopkins faces more than a fanciful risk of prosecution because of an ongoing grand jury investigation in Ohio concerning the corrugated container industry. 620 F.2d at 1091-1092. The Petitioners contest neither the *Folding Carton* standard nor its application to Mr. Hopkins.

Under the terms of PTO 44, all deposition questions were to be taken verbatim from the immunized transcripts or "derived from the same substantive matters contained in his (Mr. Hopkins') immunized testimony." Petitioners contend that this limitation relieves Mr. Hopkins from any danger he would otherwise face in answering the deposition questions. The Court of Appeals correctly ruled that this limitation does not supplant the protection afforded Mr. Hopkins by the Fifth Amendment.

This Court's decision in *Kastigar* v. *United States*, 406 U.S. 441 (1972), noted that the immunity section of the 1970 Organized Crime Control Act, 18 U.S.C. §§6001-6003 provides only use immunity, not transactional immunity. If the prosecution can show that the evidence against an immunized witness is not derived directly or indirectly from the testimony the witness gave under immunity, then the Government may prosecute the witness for the crimes described in his testimony. From *Kastigar* one vital principle emerges — use immunity protects the source of the testimony; transactional immunity protects the substance.

Every time a witness makes a statement, he creates a source. "The mere fact a witness has given testimony under immunity at one legal proceeding does not, by that fact alone, taint the same testimony given at a subsequent legal proceeding." *Appeal of Starkey*, 600 F.2d 1043, 1046 (8th Cir. 1979). Otherwise, the Government would not have sought a separate grant of immunity for Mr. Hopkins at the criminal trial. Rather, the Government would have relied on the immunity grant Mr. Hopkins received when he gave similar testimony before the grand jury. The testimony Mr. Hopkins would give in a deposition unquestionably creates a different source from the testimony he gave under immunity. The plaintiffs are not confined to asking questions identical to those in the prior grand jury and trial transcripts. Furthermore, Mr. Hopkins' deposition answers may go beyond those he gave in 1976 and 1979. Judge Singleton, though, has in effect immunized any answers Mr. Hopkins may give in direct contravention of the well-established principle that it is solely the function of the Executive Branch to determine if a witness' answers should be immunized. *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

Judge Singleton held that since plaintiffs had access to the immunized testimony, the deposition testimony would be necessarily derived from the immunized testimony and thus tainted.

Judge Singleton's "holding" is nothing more than a prediction that all future prosecutors and courts will agree that the deposition testimony will be tainted. Unfortunately, case law shows that Mr. Hopkins cannot be completely confident that other courts will agree with Judge Singleton. In *United States* v. *Rice*, 421 F.Supp. 871 (E.D. Ill. 1976), *reversed sub nom, United States* v. *Kuehn*, 562 F.2d 427 (7th Cir. 1977), a witness testified under immunity before a federal grand jury and voluntarily repeated the same testimony later to a news reporter. The witness was then indicted in state court. In an action by the United States Attorney to enjoin the state prosecution, the United States District Court implicitly found that the repetition of the testimony was not a source independent from the immunized testimony. The Court of Appeals disagreed and stated that the two sources were independent. *Rice* and *Kuehn* illustrate how two different courts can reach opposite results on the question of whether a source is tainted or independent. Mr. Hopkins should not have to run the risk that another court will consider his deposition to be an independent source. The Fifth Circuit was therefore correct in holding that the question of taint can only be determined in a proceeding in which the Government seeks to introduce a witness' unimmunized testimony. But the Government is not a party to this case and cannot seek immunity for Mr. Hopkins. 620 F.2d at 1093.

The Fifth Circuit's holding is not undercut, as Petitioners suggest, by the fact that the Petitioners had access to the grand jury testimony and would use that testimony to formulate the deposition questions. The part of the District Court opinion in *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 629 (N.D. Ill. 1979), *vacated and remanded*, 609 F.2d 867 (7th Cir. 1979), not reached on appeal shows why access to the grand jury transcripts is irrelevant:

> "Barring this Court's order of a release of the immunized grand jury testimony to the plaintiffs prior to any compelled deposition, we could not prevent the civil depositions

> from covering topics and incidents far beyond the scope of the grand jury testimony. Even assuming that we ordered a release of the prior immunized testimony and confined plaintiffs to asking questions which were actually asked under the grand jury immunity grant, we could not prevent the deponent from testifying at greater length and detail about potentially incriminating transactions."

This passage underscores why the Fifth Circuit's decision is correct even though plaintiffs have the grand jury and trial testimony — the source of incrimination is not the question; the source is the answer.

II. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CREATE A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners contend that the opinion of the Fifth Circuit conflicts with the opinions of the Eighth Circuit in *Starkey*, supra, and of the Seventh Circuit in *Patrick* v. *United States*, 524 F.2d 1109 (7th Cir. 1975). Such a conflict does not exist for one very important reason. In *Starkey* and *Patrick*, the Government was a party; in this case, the Government is not a party.

In *Starkey*, the State of Arkansas filed a civil antitrust suit against several dairies. Starkey was an employee who had previously testified before a federal grand jury under an order of immunity. The State represented to the Court that the State would consider any deposition testimony to be derived from the grand jury testimony. The Fifth Circuit properly found that this representation operated in effect as a grant of immunity by the State of Arkansas, the only potential sovereign from whom Starkey feared prosecution. In this case Judge Singleton attempted to taint the potential deposition testimony even though the Executive Branch was not involved.

In *Patrick*, the plaintiff gave immunized testimony before a federal grand jury. Based on what it had learned from that testimony, the Government filed a jeopardy tax assessment against Patrick. Patrick then sought to enjoin the assessment claiming that otherwise he would have to file a tax refund suit in which he would have to testify and incriminate himself. The Seventh Circuit rejected this argument by holding that Patrick need not fear prosecution following the refund suit. The Seventh Circuit did not, as Petitioners contend, make a prospective determination of taint resulting in a conflict with the instant case. Rather, the Seventh Circuit ruled that Mr. Patrick would be forced to testify in the refund suit only because the Government used the immunized testimony as a basis for the assessment. Thus the Government gave Patrick an "implied immunity" for testimony in the refund suit. 524 F.2d at 1120.

The foregoing analysis of *Patrick* and *Starkey* demonstrates that no conflict among the Circuits exists. Unlike *Starkey* and *Patrick*, in this case the Government is not a party. In the only other court decision in a purely private action to consider whether a formerly immunized witness could later be compelled to give a civil deposition if there were any possible prosecutions on the horizon, the court said that it would not make a prospective determination of taint. *Folding Carton*, supra, 465 F.Supp. at 629.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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